No. 930

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1958

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS AND CEMENT FINISHERS UNION NO. 5, FLORIDA

PETITIONER

v.

CONE BROTHERS CONTRACTING COMPANY

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No. 930

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, AND CEMENT FINISHERS' UNION NO. 3, FLORIDA
PETITIONER

versus

CONE BROTHERS CONTRACTING COMPANY
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Pursuant to Rule 40, paragraph 3, of the Rules of this Honorable Court, Respondent adopts as correct statements contained in the Petition with respect to OPINIONS BELOW (Petition, pp. 1-2), CONSTITUTION AND STATUTORY provisions involved (Petition, pp. 3-4), and STATEMENT OF THE CASE (Petition, pp. 4-6).

JURISDICTION OF THE PETITION FOR WRIT OF CERTIORARI

The decisions arose from a complaint filed pursuant to the provisions of Section 303, Labor Management Relations Act, as amended (29 U.S.C.A. 187). The Supreme Court of the United States has jurisdiction to review the decisions entered herein by the United States Court of Appeals for the Fifth Circuit, but Respondent respectfully submits that an exercise of sound judicial discretion will deny review since the decisions herein do not conflict with the decision of any other United States Court of Appeals, do not decide issues not already decided by this Honorable Court, and are not in conflict with any decision of this Honorable Court.

QUESTIONS FOR DECISION UPON PETITION FOR CERTIORARI

I.

Whether or not Sound Judicial Discretion Will Allow a Writ of Certiorari Herein When the Decisions Below Do Not Conflict With the Decision of Any Other United States Court of Appeals, Do Not Decide Any Issue Not Already Decided by the Supreme Court and Are Not in Conflict With Any Decision of the Supreme Court.

II.

Whether or Not It is Necessary for Federal Jurisdiction Under Section 303, Labor Management Relations Act, That There be Interstate Flow At The Site of Dispute, If There Are Facts Alleged Establishing That the Industry or Activity of The Employer Affected By the Dispute is in Interstate Commerce.

III.

Whether or Not The Court of Appeals Erred in Entertaining Jurisdiction of the Appeal Where the Notice of Appeal Recited the Date of a Non-Final Order, But the STATEMENT OF POINTS, DESIGNATION OF RECORD and Contents of Final Order All Indicated Clear Intention that Appeal be Taken From the Latter Final Order.

ARGUMENT and CITATION OF AUTHORITY

At the outset, Respondent submits that in the exercise of sound judicial discretion, the petition for a writ of certiorari should be denied, since the decisions of the Court of Appeals are not in conflict with those of any other Circuit, are not in conflict with any decision of this Honorable Court, and do not decide issues not already decided by this Honorable Court.

POINT ONE

THE COURT OF APPEALS DID NOT ERR IN FINDING THE COMPLAINT HEREIN SUFFICIENTLY ALLEGED RESPONDENT IS "AN INDUSTRY OR ACTIVITY AFFECTING INTERSTATE COMMERCE," AS THAT TERM IS USED IN SECTION 303, LABOR MANAGEMENT RELATIONS ACT.

The Labor Management Relations Act (hereinafter called the Act), Section 2 (6) [29 U.S.C.A. 152 (6)], defines in explicit terms the meaning of "commerce" as used in that Act. The definition of the term "commerce" establishes that in the Act, Congress meant to exercise to the fullest its powers over interstate commerce. *Guss v. Utah Labor Relations Board* 353 U.S. 1; *N.L.R.B. v. Denver Building and Construction Trades Council, et al*, 341 U. S. 675; *National Polish Alliance v. N. L. R. B.*, 322 U. S. 643; *International Brotherhood of Electrical Workers, Local 501, et al, v. N. L. R. B.* (C.A. 2), 181 F. 2d. 34.

The term "affecting commerce" is defined in Section 2 (7) of the Act [29 U.S.C.A. 152 (7)]:

> "Sec. 2. When used in this Act . . . (7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing the free flow of commerce."

Under the definitions contained in the Act, the term "affecting commerce" must be given the same construction whether used, as here, in Section 303 (29 U.S.C.A. 187) or in reference to unfair labor practices, defined in Section 8 (a) and (b) of the Act [29 U.S.C.A. 158 (a) and (b)]; or in reference to elections as contained in Section 9 (a) - (h) of the Act [29 U.S.C.A. 159 (a) - (h)].

Both the Circuit Court of Appeals and the National Labor Relations Board have asserted jurisdiction over the Respondent in the past. *Cone Brothers Contracting Co. v. N.L.R.B.*, 235 F. 2d. 37 (1956); *Cone Brothers Contracting Co.*, 114 N.L.R.B. 303 (1955).

The complaint alleges Respondent is an industry affecting commerce and alleges facts to support that conclusion (TR 2). It is submitted that the Circuit Court was correct in holding the allegations sufficient to satisfy the requirement that Respondent be engaged in interstate commerce and is "an industry or activity affecting commerce" as that term is used in Section 303 of the Act (29 U.S.C.A. 187). *Local 74, United Brotherhood of Carpenters and Joiners of America, AFL, et al, v. N.L.R.B.*, 341 U.S. 947; *International Brotherhood of Electrical Workers, Local 501, et al, v. N.L.R.B.*, 181 F. 2d. 34 (C.A. 2).

POINT TWO

THE COURT OF APPEALS DID NOT ERR IN DECIDING THAT IT WAS NOT NECESSARY TO ALLEGE COMMERCE AT THE DISPUTE SITE, SINCE THE TRUE TEST OF JURISDICTION IS WHETHER THE INJURED PARTY IS ITSELF AN INDUSTRY AFFECTING COMMERCE.

Within the meaning of the term "an industry or activity affecting commerce" as used in Section 303 and throughout the Act, we submit that an industry (or employer) either affects commerce or does not affect commerce. Under the Act, if an industry affects commerce for one purpose of the Act, it affects commerce for all purposes of the Act. Thus, so long as an employer's operations affect commerce, the application of the Act cannot be defeated merely because the activity complained of occurred at a local site into which no interstate goods were flowing. *N.L.R.B. v. Denver Building and Construction Trades Council, et al*, 341 U.S. 675.

POINT THREE

THE COURT OF APPEALS DID NOT ERR IN ENTERTAINING JURISDICTION OF THE APPEAL, SINCE PETITIONER WAS NEITHER MISLED NOR OTHERWISE PREJUDICED BY MISSTATEMENT OF THE DATE OF THE ORDER APPEALED FROM.

In citing the incorrect date of the District Court Order from which appeal was taken, Petitioner was not misled nor in any other way prejudiced in preparing its case on appeal. Petitioner makes no contention that it was, in fact, either misled or prejudiced.

The error complained of was one of form, not substance, and within the discretion of the Court of Appeals to disregard. *Hoiness v. United States*, 335 U. S. 297; *State Farm Mutual Automobile Insurance Co. v. Palmer*, 350 U.S. 944, reversing 225 F. 2d. 876; *United States v. State of Arizona*, 346 U.S. 907, reversing 206 F. 2d. 159; *United States v. Elliott*, 223 U.S. 524. Rule 18, Rules of Circuit Court of Appeals, Fifth Circuit, adopting Rule 75 (h), Federal Rules of Civil Procedure.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Frank McClung and Richard E. McGee, Hernando State Bank Building, Brooksville, Florida, as attorneys for Petitioner by United States first class mail, postage prepaid, this ..... day of May, 1959.

WILLIAM H. AGNOR
OF COUNSEL